UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE OF THE UNITED STATES
IN OPPOSITION TO DEFENDANTS' MOTION FOR
PRODUCTION OF EVIDENCE FAVORABLE TO THE ACCUSED

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I
INTRODUCTION

Defendants have filed a *Motion For Production of Evidence Favorable to the Accused* ("Motion"). At first blush, this Motion appears to be a stock request for information that must be disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). But the defendants go much further in their Motion, requesting a large laundry list of items to which they are not entitled under Brady. Here, the defendants incorrectly use Brady as an omnibus pre-trial discovery device. The defendants also wrongly believe that they are entitled to Brady/Giglio information in a particular form, when in fact all they are entitled to is the information itself.

The United States understands its Brady/Giglio obligations, and, further, understands its obligations to be continuing in nature. The United States has complied fully with its Brady/Giglio obligations. If the United States becomes aware of any additional information falling within Brady or Giglio, such information will be disclosed to the defendants in a timely fashion. Accordingly, the defendant's Motion should be denied.

II
LAW AND ARGUMENT

A. THE DEFENDANTS ARE NOT ENTITLED TO THE MATERIALS REQUESTED IN THEIR LAUNDRY LIST OF ITEMS FOUND IN SECTION I OF THEIR MOTION

1. Defendants Are Not Entitled Under Brady To The Names And Addresses Of All Persons Who Have Or May Have Information Favorable To The Defendants Or Which Is Inconsistent With The Government's Theory Of The Case

Though requested, the defendants are not entitled to the names and addresses of all persons who have or may have information which is favorable to the defendants or which is "inconsistent in any way" with the government's theory of the case. Under Brady and Giglio, the defendants are entitled only to exculpatory or impeachment information "material" to guilt or punishment. To be deemed "material," the favorable evidence must have a "reasonable probability" of affecting the result of the proceeding. Kyles v. Whitley, 514 U.S. 419, 433 (1995). A reasonable probability of affecting a result is shown when the suppression of favorable evidence "'undermines confidence in the outcome of the trial.'" Id. at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985). Moreover, evidence of impeachment is not material when it "'merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" United States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996) (quoting United States v. Wong, 78 F.3d 73, 79 (2d Cir. 1996)). The "materiality" standard of Brady and Giglio is thus much different than the "inconsistent in any way" standard posited by the defendants.

Here, the United States has complied with its Brady/Giglio obligations and understands them to be continuing in nature. To the extent that any person has disclosed to the government any exculpatory information that is material to the guilt or punishment of the defendants, that information has already been disclosed to the defendants. In fulfilling its

discovery obligations, the United States has already produced, among other things, more than 120 boxes of relevant documents covered under Rule 16(a)(1)(C), statements of Martin News employees covered under Rule 16(a)(1)(A)(1) and (2), and a letter dated February 12, 2001, laying out additional information now known to the government arguably falling within Brady or Giglio. In this letter, we identified the source of the information. No more is required. Accordingly, this particular request is moot and the Motion should be denied.

2. Defendants Are Not Entitled Under Brady To The Names And Addresses Of All Persons Interviewed By The Government In Connection With This Investigation But Who Will Not Be Trial Witnesses

Though requested, the defendants are not entitled to the names and addresses of all persons interviewed by the government in connection with this investigation but who will not be called as trial witnesses. Neither Brady nor Giglio requires this information to be disclosed. Nor do the defendants cite any other case in support of their sweeping request. The United States is aware of no law or rule entitling the defendants to a complete blueprint of the government's grand jury investigation, nor do defendants cite any authority for this proposition.

Fundamentally, the defendants misunderstand the purpose of Brady and Giglio. They treat these cases as vehicles for extensive pre-trial discovery, when in fact Brady and Giglio are not, they are rules of fairness. See, e.g., Flores v. Satz, 137 F.3d 1275, 1278 n.8 (11th Cir. 1998) (Brady is "'is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.' As a result, an attempt to have Brady encompass discovery materials, in general, must be unavailing." (citations omitted)). See also United States v. Davis, 752 F.2d 963, 976 (5th Cir. 1985) (Where defendant seeks to conduct a "fishing expedition" for exculpatory material, the court need not allow access to all government material because the defendant might find something exculpatory). Brady does not require

the government to compile and disclose to the defendants its witness list for trial. It stands to reason that Brady also does not require the government to compile and disclose what amounts to a non-witness list.

Of course, to the extent that any person interviewed by the government has disclosed to the government any exculpatory information material to the guilt or punishment of the defendants, that information has already been produced to the defendants. Accordingly, this particular request is moot and the Motion should be denied.

3. The Defendants Are Not Entitled Under Brady To The Written Or Recorded Statements Or Report Of Any Person Or The Substance Or Results Of Any Polygraph Examination Administered To Any Co-Defendant

Though requested, the defendants are not entitled to any written or recorded statements or report of any person (including reports of investigative or law enforcement agents) which contain information "inconsistent in any way" with the government's theory of the case, including the substance of any polygraph examination administered to any co-defendant. Again, the defendants apply their own "inconsistent in any way" standard and ignore the "materiality" standard of Brady. The United States has already disclosed to the defendants all known information arguably covered under Brady and Giglio. Accordingly, this particular request is moot and the Motion should be denied.

The defendants are mistaken if they believe Brady requires that favorable information be disclosed in a particular manner or form. It does not. Here, in addition to producing more than 120 boxes of materials and various witness statements in compliance with Rule 16, the United States complied with its Brady/Giglio obligations by sending a letter to defendants (dated February 12, 2001) laying out evidence that may arguably be construed as falling within Brady or Giglio. For example, it is clear that defendants are not entitled under Brady or Giglio to the actual grand jury transcripts or Jencks statements, but only

the information itself. See, e.g., United States v. Grossman, 843 F.2d 78, 84-85 (2d Cir. 1988), cert. denied, 488 U.S. 1040 (1989) (Defendant not entitled to grand jury transcript containing exculpatory information, only the information); United States v. Five Persons, 472 F. Supp. 64, 69 (D.N.J. 1979) (Neither Brady nor Jencks require actual "statement" to be disclosed, only the information). In Grossman, the Second Circuit held that a "Brady" letter disclosing favorable information satisfied due process. Grossman, 843 F.2d at 84-85. Like in the above cases, the defendants here are not entitled to the actual reports containing favorable information, only the information itself, which has already been disclosed. To the extent that any favorable statements are covered under Jencks, the United States, too, understands its Jencks obligations and intends to comply as required under the statute, 18 U.S.C. § 3500. See, e.g., United States v. Campagnuolo, 592 F.2d 852, 860 (5th Cir. 1979) (Jenks statements disclosed at trial after a witness has testified is all that is required under 18 U.S.C. §3500).

The United States is not aware of any polygraph examinations or results falling within the defendants' request. Bennett Martin is the only individual defendant, his co-defendant is a corporation. Accordingly, this particular request is moot and the Motion should be denied.

4. The Defendants Are Not Entitled Under Brady To Portions Of Any Reports, Memoranda, Notes, Or Other Writings Or Recordings Containing Verbatim Accounts Or Summaries Of The Substance Of Any Oral Statement Made By A Person Which Is Favorable To The Defendants Or Which Is Inconsistent In Any Way With The Government's Theory Of The Case

Though requested, the defendants are not entitled under Brady to portions of any reports, memoranda, notes, or other writings or recordings containing verbatim accounts or summaries of the substance of any oral statement made by a person which is favorable to the defendants or which is inconsistent in any way with the government's theory of the case. As stated above, the United States understands, and has complied with, its Brady/Giglio obligations. The United States recognizes its continuing disclosure obligations. Also, as stated above, the defendants are not entitled to receiving Brady/Giglio information in a particular form. They are simply entitled to the information itself. Moreover, the defendants are entitled to "material" favorable evidence, not information "inconsistent in any way" with the government's theory. The United States also understands its Jencks obligations, so any verbatim statements of government witnesses, or statements adopted by government witnesses, that fall within Jencks will be turned over consistent with the statute. See, e.g., United States v. Campagnuolo, 592 F.2d 852, 860 (5th Cir. 1979). Accordingly, this particular request is moot and the Motion should be denied.

5. The Defendants Are Not Entitled Under Brady To Any Written Or Recorded Statements Of Any Person Interviewed By The Government In Connection With The Investigation But Who The Government Does Not Intend To Call As a Witness At Trial

Though requested, the defendants are not entitled under Brady to any written or recorded statements of any person interviewed by the government in connection with its investigation but who the government does not intend to call at trial as a witness. Again, the defendants try to use Brady as a general discovery device. As stated above, the United

States understands, and has complied with, its Brady/Giglio obligations, and also recognizes the continuing nature of its disclosure obligations. Also, as stated above, the defendants are not entitled to receiving Brady/Giglio information in a particular form. They are simply entitled to the information itself, which has already been disclosed. Moreover, the Jencks Act does not apply to this category of requested documents, since the request seeks statements of persons who will not testify at trial. Accordingly, this particular request is moot and the Motion should be denied.

6. The Defendants Are Not Entitled Under Brady To Portions Of Any Reports, Memoranda, Notes, Or Other Writings Or Recordings Which Contain A Verbatim Account Or Summary Of The Substance Of Any Oral Statement Made By Any Person Interviewed By The Government In Connection With The Investigation But Who The Government Does Not Intend To Call As A Witness At Trial

Though requested, the defendants are not entitled under Brady to portions of any reports, memoranda, notes, or other writings or recordings containing a verbatim account or summary of the substance of any oral statement made by any person interviewed by the government in connection with this investigation but who the government does not intend to call as a witness at trial. Again, the defendants attempt to use Brady as a general discovery device. As stated above, the United States understands, and has complied with, its Brady/Giglio obligations, and also recognizes the continuing nature of its disclosure obligations. Also, as stated above, the defendants are not entitled to receiving Brady/Giglio information in a particular form. They are simply entitled to the information itself, which has already been disclosed. Moreover, the Jencks Act does not apply to this category of requested documents, since the request seeks statements of

persons who will not testify at trial. Accordingly, this particular request is moot and the Motion should be denied.

B. THE DEFENDANTS ARE NOT ENTITLED TO THE MATERIALS REQUESTED IN THEIR LAUNDRY LIST OF ITEMS FOUND IN SECTION II OF THEIR MOTION

In Section II of their Motion, the defendants seek four separate categories of information. The defendants clearly are not entitled to the materials requested in Paragraphs A and D of this section of their Motion. Though requested, they are not entitled under Brady to "[a]ll written or recorded statements or reports previously made by any person other than the witness which contradicts the witness on any portion of direct testimony which attributes to the witness any statement which is inconsistent with any testimony given by the witness on direct examination." Motion, p. 3, ¶A (emphasis added). Nor are the defendants entitled under Brady to "[t]hat portion of the grand jury testimony of any other person other than the witness which contradicts the witness on any portion of direct testimony or which attributes to the witness any statement which is inconsistent with any testimony given by the witness on direct examination." Id., ¶D (emphasis added).

As with all of their sweeping requests, the defendants again read out of Brady any requirement of "materiality." They also continue to insist, mistakenly, on receiving Brady information in a particular form (i.e., the actual grand jury testimony or the actual reports containing witness statements). It suffices to say that the United States understands its Brady/Giglio obligations, has complied with its obligations, and understands the continuing nature of its disclosure obligations. To the extent that any of the materials requested in this section qualify as Jencks statements, they will be turned over as required under the statute. Accordingly, these two particular requests (Paragraphs A and D, Section II) are moot and the Motion should be denied.

In Paragraph B, Section II, of their Motion, the defendants request "[a]ny FBI

Identification Sheet or other document or writing (commonly known as a "rap sheet") showing all prior arrests and convictions of the witness." Motion, Section II, p. 3, ¶B. As part of its discovery obligations, the United States has already turned over Bennett Martin's rap sheet. Presently, the United States is unaware of any of its prospective witnesses having a rap sheet. If the United States learns that any government witness who testifies at trial has a rap sheet, the United States will disclose this information in a timely manner as required under Brady or Giglio. Accordingly, this particular request (Paragraph B, Section II) is moot and the Motion should be denied.

Finally, in Paragraph C, Section II, of their Motion, the defendants request "[a] memorandum setting out in detail all offers of immunity, promises of leniency, or threats of prosecution communicated to the witness, directly or indirectly, in order to secure said witness' testimony." Motion, Section II, p. 3, ¶C. Neither Brady nor Giglio require the United States to create documents for the defendants. In fulfilling its discovery obligations under Brady and Giglio, as well as under Rule 16, the United States already has disclosed to the defendants all plea agreements related to the charged conspiracy, all relevant formal immunity orders, all relevant informal immunity letters, and all relevant proffer letters, as well as all other information material to the guilt or punishment of the defendants. Brady and Giglio require no more. Other than a target letter sent to Brian Weiner and his company, PMG, and statements made to Weiner and Mark Cohen (and their attorneys) that the United States had sufficient evidence to prosecute them and their companies for antitrust violations, the United States is not aware of any "threats of prosecution communicated to the witness, directly or indirectly" to Brian Weiner or Mark Cohen. Motion, Section II, p.3. Accordingly, this particular request (Paragraph C, Section II) is moot and the Motion should be denied.

C. THE DEFENDANTS ARE NOT ENTITLED TO THE MATERIALS REQUESTED IN SECTION III OF THEIR MOTION

In Section III of their Motion, the defendants claim that they have reason to believe that the government has two categories of materials to which they believe they are entitled under Brady. The defendants are mistaken, however, because the United States has no such materials in its possession.

First, the defendants request "[c]orrespondence between counsel for Brian Weiner and Mark A. Coh[e]n advocating or presenting within the correspondence or attachments to said correspondence facts or evidence supporting their contention that their clients are innocent of the violations of antitrust laws of the [U]nited States." Motion, Section III, pp. 3-4, ¶A. The United States is not aware of any such correspondence in its possession. If such correspondence exists, however, it would have been shipped to Dallas last January or February as part of the government's Rule 16 discovery. The defendants have access to these materials. As stated throughout the government's response, the United States understands its continuing disclosure obligations under Brady and Giglio and, if the government ever becomes aware of such correspondence, will disclose it in a timely manner as required under Brady or Giglio. Accordingly, this particular request (Paragraph A, Section III) is moot and should be denied.

Second, the defendants request "[f]inancial information, business account information, destroyed service information and other charts, graphs, or computer generated material supporting Mark Cohen's and Brian W[ei]ner's position taken with the government that they were innocent of any alleged violation of the antitrust laws of the United States as part of a conspiracy with Martin News Agency, Inc., and Bennett T. Martin." Motion,

Section III, p. 4, ¶B. In fulfilling its discovery obligations under Rule 16, the United States produced to the defendants all of the documents in its possession subpoenaed or received from PMG/Trinity News (Brian Weiner's company) and C&S News (Mark Cohen's company). The information sought by the defendants in this request, to the extent it exists, has already been produced, having been shipped to Dallas last January and February.[1]

D. THE UNITED STATES IS UNDER NO OBLIGATION TO TRACK DOWN AND PRODUCE A PLEA AGREEMENT THAT IS MORE THAN 25 YEARS OLD

The defendants request that United States track down and produce a plea agreement between one of Brian Weiner's former companies and the government dating back more than 25 years. In fulfilling its Brady/Giglio obligations, the United States disclosed the plea agreement and Informations relating to the recent antitrust violations committed by Brian Weiner's companies: Rack Shop (DE), Inc., and Island Periodicals, L.L.C. Obviously, these Informations and plea agreement are grist for impeachment. It is difficult to conceive exactly how the defendants intend to get into evidence at trial a conviction (i.e., plea agreement) against one of Brian Weiner's former companies for conduct which dates back more than 25 years. Fed. R. Evid. 609 (a) and (b) makes inadmissable felony convictions more than 10 years old.

In addition, the plea agreement and related Information sought by the defendants are public records. Brady does not require the government to track down and produce information that is equally available to the defendants. Accordingly, this particular request should be denied.

III
CONCLUSION

For the foregoing reasons, the Defendants' Motion should be denied. The United States

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[1] For the record, the government has no idea what "destroyed service information" is.

understands its Brady/Giglio obligations, has complied fully with them, and understands their continuing nature. Many, if not most, of the categories of materials requested by the defendants simply do not fall within Brady or Giglio, nor do they fall within Jencks, Rule 16, or any other criminal discovery rule.

Respectfully Submitted,

"/s/"

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April, 2001.

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